HWG | HARRIS, WILTSHIRE & GRANNIS LLP

1919 M STREET NW
SUITE 800
WASHINGTON DC 20036

TEL +1 202 730 1300
FAX +1 202 730 1301
HWGLAW.COM

ATTORNEYS AT LAW

September 20, 2016

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Communication in MB Docket No. 16-41

Dear Ms. Dortch:

Over the last few days, Ross Lieberman of the American Cable Association and I have met with Commission staff to discuss the Commission's *Diverse Programming NOI*. On September 16, we met with Matthew Berry of Commissioner Pai's office. On September 20, we met with Gigi Sohn and Jessica Almond of Chairman Wheeler's office, David Grossman of Commissioner Clyburn's office, and Robin Colwell of Commissioner O'Rielly's office. At each meeting, we discussed including in the proposed NPRM[1] the questions ACA had proposed in its August 26 *ex parte*, a copy of which is attached to this letter.

Pursuant to the Commission's rules, I will file one copy of this letter electronically in MB Docket No. 16-41. Should you have any questions, please contact me.

Respectfully submitted,

Michael Nilsson

cc: Meeting participants

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[1] Press Release, "Tentative Agenda for September Open Meeting of the FCC" (Sept. 8, 2016), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0908/DOC-341151A1.pdf. ("The Commission will consider a NPRM that proposes steps the Commission can take to promote the distribution of independent and diverse programming to consumers.")

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August 26, 2016

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Communication in MB Docket No. 16-41

Dear Ms. Dortch:

On August 24, 2016, Ross Lieberman of the American Cable Association and Michael Nilsson, ACA's outside counsel, met with Commission staff to discuss the *Diversity NOI*.[1] Present on behalf of the Commission were Bill Lake (by telephone), Michelle Carey, Nancy Murphy, Martha Heller, Raelynn Remy, Susan Singer, Kim Makuch, and Zaira Gonzalez.

We began by thanking the Commission for its work in administering both the *Diversity NOI* and the public workshops on the state of the video marketplace.[2] The Commission developed an extensive record in these proceedings, including detailed submissions from ACA and its members.[3] The Commission should proceed to a Notice of Proposed Rulemaking that builds on this record and seeks comment on the full range of diversity-related issues.

From ACA's perspective, any such NPRM should seek comment about how forced bundling and penetration requirements affect diversity—and about potential restrictions on such practices. An NPRM should also seek comment about MFNs *directed at multichannel video programming distributors* ("MVPDs") as well as those directed at online providers. The

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1 *See Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, 31 FCC Rcd. 1610 (2016) ("*Diversity NOI*").

2 *See* Second Media Bureau Workshop on the State of the Video Marketplace, *available at* https://www.fcc.gov/news-events/events/2016/04/second-media-bureau-workshop-state-video-marketplace.

3 *See* Comments of the American Cable Association, MB Docket No. 16-41 at 5-8 (filed Mar. 30, 2016) ("ACA Comments"); Reply Comments of the American Cable Association, MB Docket No. 16-41 at 2 (filed Apr. 19, 2016) ("ACA Reply Comments").

Commission should also seek comment on the appropriate definition of "independent" programming, as well as on various sources of potential authority for Commission action.

1. Bundling

ACA and others submitted record evidence, including declarations issued under penalty of perjury, showing that large programmers impose bundling requirements that make smaller cable operators carry dozens of unwanted networks.[4] These requirements devour limited capacity that could instead be used to carry independent programmers or increase broadband performance—thereby making access to online independent programmers more attractive.[5] They also strain programming budgets to the point where small cable operators have no discretionary funds left for independent programmers.[6]

In light of this record evidence, a diversity-related NPRM should seek comment on the following issues.

1. How widespread is bundling by large programmers? Is ACA's claim that the largest nine programmers invariably require the bundling of 65 networks accurate?[7] Is this particular to ACA members, or do other MVPDs have to carry a similar number of networks from these nine large programmers? To the contrary, are programmers' claims that they never engage in "take it or leave it" bargaining accurate?[8] How can we reconcile these competing claims? Do programmers act differently in their negotiations with buying groups, such as NCTC, than they do in negotiations with MVPDs negotiating on their own behalf?[9]

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4 ACA Comments at 14-16; Declaration of Judy Meyka, Executive Vice President of Programming, National Cable Television Cooperative, ¶ 3, *attached to* ACA Reply Comments ("Meyka Decl."); Remarks of Judy Meyka at 2, FCC Diversity Workshop Apr. 25, 2016 ("Meyka Workshop Remarks"), *available at* https://www.fcc.gov/news-events/events/2016/04/second-media-bureau-workshop-state-video-marketplace#acc3.

5 ACA Comments at 18-22; Meyka Decl., ¶¶ 4, 7; Declaration of Chris Kyle, Vice President—Industry Relations & Regulatory, Shentel Broadband, *attached to* ACA Reply Comments ("Kyle Decl."); Meyka Workshop Remarks at 3; Remarks of Chris Kyle at 2-3, FCC Diversity Workshop Apr. 25, 2016 ("Kyle Workshop Remarks"), *available at* https://www.fcc.gov/news-events/events/2016/04/second-media-bureau-workshop-state-video-marketplace#acc3; Remarks of Heather McCallion, Vice President of Programming, Atlantic Broadband at 2, FCC Diversity Workshop Apr. 25, 2016 ("McCallion Workshop Remarks").

6 ACA Comments at 22-23; Kyle Decl., ¶¶ 5-6; McCallion Workshop Remarks at 5.

7 ACA Comments at 14-16.

8 Comments of the National Association of Broadcasters MB Docket No. 16-41 at 2 (filed Mar. 30, 2016) ("NAB Comments").

9 *See* ACA Comments at 3-5 (describing NCTC).

2. Does bundling inhibit MVPDs from carrying independent programming? If so, to what extent does it do so? Are ACA's claims in this regard accurate?[10] Is opportunity to gain carriage across a wide range of MVPDs, including smaller MVPDs, important to independent programmers?

3. Does bundling have especially pernicious effects on capacity-constrained MVPDs? Is "capacity constrained" defined in programming agreements and, if so, how? What should be considered "capacity constrained" for these purposes? Are ACA's claims that programmers insist on bundling even with respect to capacity constrained systems accurate?[11] Are programmers' claims that they do or should provide relief for such systems accurate?[12] How can we reconcile these competing claims?

4. Does bundling inhibit broadband deployment? If so, how? Does this occur across all MVPDs or only those that are capacity-constrained? Are ACA's claims that bundling meaningfully inhibits broadband deployment accurate?[13]

5. More generally, what is the relationship between broadband deployment and diversity? Is it true, as ACA suggests, that expanded broadband deployment both "provides subscribers with access to a vast universe of programming" and "promises to make it easier for independent and niche programmers to gain a toehold, at least in the long run?"[14]

6. If a programmer offers its programming online on an *a la carte* basis, should the programmer have a duty to offer such programming to MVPDs to make available to their customers on a similar basis?

7. If it finds that bundling harms diversity in at least some circumstances, should the Commission prohibit or restrict the type of bundling causing this harm?

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[10] ACA Comments at 18-22 (describing how bundling requirements force small cable operators to devote capacity to unwanted programming that could instead be used to carry independent programmers or increase broadband performance—thereby making access to online independent programmers more attractive).

[11] Mekya Decl. ¶ 4 (noting that large programmers provide bundling relief only in limited circumstances to the systems that are extremely capacity constrained); Kyle Decl. ¶¶ 3-4 (noting that even 750 MHz systems face significant capacity constraints, and describing multiple Shentel systems with one Gigahertz of capacity that have fewer than five channels of capacity that can be devoted to additional video or broadband).

[12] Comments of Comcast/NBCU, MB Docket No. 16-41 at 33 (filed Mar. 30, 2016) ("Comcast/NBCU Comments").

[13] ACA Comments at 18-22

[14] *Id.* at 11.

a. Should the Commission restrict or prohibit "forced" bundling? If so, how can the Commission determine whether bundling is "forced" or instead is the product of a negotiated give-and-take?

a. Should the Commission restrict bundling of certain combinations of programming, such as:

   i. The bundling of two sets of desirable or "must-have" programming?[15]

   ii. The bundling of desirable or "must-have" programming with undesirable programming?

   iii. How can or should the Commission distinguish desirable programming from undesirable programming?

b. Should the Commission restrict bundling offers or demands directed only at certain parties, such as:

   i. Bundling against smaller MVPDs or their buying groups that may lack leverage to engage in effective bargaining?

   ii. Bundling with respect to capacity-constrained systems, for which the harm of bundling is especially pronounced?

   iii. Bundling with respect to MVPDs that may have a higher percentage of customers that are lower income?

   iv. Bundling of a particular channel with respect to MVPDs without subscribers likely to express interest in that channel (such as the forced bundling of a Spanish-language channel for cable systems with very few Spanish-speaking customers; or the forced bundling of an urban-interest channel for rural cable systems).

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[15] The Commission has found that such combinations raise particular concerns. *Comcast Corp., Gen. Elec. Co., and NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶ 137 (2011) ("*Comcast-NBCU Order*"); *Amendment of the Commission's Rules Related to Retransmission Consent*, 29 FCC Rcd. 3351, ¶ 14 (2014); *see also* William Rogerson, "Economic Analysis of the Competitive Harms of the Proposed Comcast-NBCU Transaction" at 14-17 (June 21, 2010), *attached to* Comments of the American Cable Association, MB Docket No. 10-56 (filed June 21, 2010); William Rogerson, "A Further Economic Analysis of the Proposed Comcast-NBCU Transaction" at 23-27 (Aug. 19, 2010), *attached to* Reply Comments of the American Cable Association, MB Docket No. 10-56 (filed Aug. 19, 2010).

c. Should the Commission impose "procedural" restrictions on bundling, such as the ability for an MVPD to request sequential negotiations?[16] If so, how should such restrictions work?

2. Penetration Requirements

ACA and others have submitted record evidence, including declarations issued under penalty of perjury, showing that large programmers impose penetration requirements making smaller cable operators carry dozens of networks in a bloated "super expanded basic" tier.[17] Penetration requirements increase the cost for subscribers to purchase independent channels (which, lacking the extra leverage bundling provides, are generally found on more expensive specialty tiers).[18] Such requirements also make it impossible for smaller cable operators to offer "skinny bundles" that consumers increasingly want as a complement to broadband video.[19]

In light of this record evidence, a diversity-related NPRM should seek comment on the following issues:

1. How common is it for large programmers to include penetration requirements in their deals with MVPDs? ACA claims that all large programmers engage in this activity, and that none of them engage in meaningful negotiation on the subject.[20] Are these claims accurate? Is this particular to ACA members, or do other MVPDs face this same problem? Or are such provisions the subject of a "meeting of the minds," as programmers suggest?[21] How can we reconcile these opposing claims? Do programmers act differently in their negotiations with buying groups, such as NCTC, than they do in negotiations with MVPDs negotiating on their own behalf?[22]

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16 Comments of the American Cable Association, MB Docket No. 15-216, at 32 (filed Dec. 1, 2015) ("ACA STELAR Comments").

17 ACA Comments at 26-28; Meyka Decl., ¶ 8; Meyka Workshop Remarks at 3.

18 ACA Comments at 29-31 (describing the "income effect" of penetration requirements); McCallion Workshop Remarks at 7; *see also, e.g.*, Comments of RFD-TV, MB Docket No. 16-41, at 21 (filed Mar. 20, 2016) ("[T]iering practices have the effect of reducing the ability of independent programmers to obtain carriage. In some instances, RFD-TV is carried on sports tiers or other less penetrated tiers, which requires RFD-TV fans to pay more for tiers that they otherwise would not want, and reduces RFD-TV's reach.").

19 ACA Comments at 31-33; Kyle Decl., ¶ 7; Kyle Workshop Remarks at 4.

20 ACA Comments at 26-28

21 Comcast/NBCU Comments at 63.

22 *See* ACA Comments at 3-5 (describing NCTC).

2. Do penetration requirements inhibit MVPDs from carrying independent programming? Do such requirements raise the cost of the basic tier, as ACA suggests?[23]

3. What, if anything, is the impact of higher prices for expanded basic service on subscribership to independent programming? Do higher prices depress such subscribership, as ACA suggests?[24] Do penetration requirements result in independent programming being carried in less-penetrated tiers, as ACA suggests?[25]

4. Do penetration requirements hinder cord shaving, as ACA suggests?[26] Does this in turn hinder broadband deployment? How?

5. Are penetration requirements ever beneficial to consumers? If so, how can the Commission tell the difference between harmful and helpful contractual provisions?

6. Do the rules governing cable carriage of broadcast stations promote or harm diversity? May cable operators subject to effective competition lawfully seek to carry broadcasters electing retransmission consent in tiers other than broadcast basic?[27] If so, what are the prospects that a retransmission consent electing station might agree to any such proposal? Would it promote diversity to allow broadcasters and MVPDs to negotiate for such carriage rather than for the Commission to dictate such carriage? Does the Commission have authority to allow such negotiations?[28]

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[23] ACA Comments at 29-31.

[24] *Id.*

[25] *Id.*

[26] ACA Comments at 31-33

[27] The Commission has declined to answer this question, describing it as one of "statutory interpretation" that did not require an answer. *Amendment to the Commission's Rules Concerning Effective Competition*, 30 FCC Rcd. 6574, ¶ 12 (2015).

[28] *See* 47 U.S.C. § 543 (b)(7) ("Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service"); *id.* § 543 (a)(2) ("If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section. If the Commission finds that a cable system is not subject to effective competition--(A) the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6), in accordance with the regulations prescribed by the Commission under subsection (b) of this section; and (B) the rates for cable programming services shall be subject to regulation by the Commission under subsection (c) of this section").

7. If it finds that penetration requirements harm diversity in at least some circumstances, should the Commission prohibit or restrict them in those circumstances?

    a. Should the Commission cap penetration requirements at a particular percentage of the subscribership base? If so, how should that cap be determined?

    b. Should the Commission restrict the operation of penetration requirements in particular circumstances, such as when cable subscribers choose to subscribe only to the mandated broadcast basic tier?[29]

    c. Should the Commission restrict or prohibit "forced" penetration requirements? If so, how can the Commission determine when such requirements are "forced" or are instead the product of a negotiated give-and-take?

    d. Should the Commission restrict penetration requirements only against certain parties?

        i. Penetration requirements imposed on smaller MVPDs or their buying groups that may lack leverage to engage in effective bargaining?

        ii. Penetration requirements imposed on MVPDs where the harm of the penetration requirements is especially pronounced or otherwise disserves the public interest?

        iii. Penetration requirements imposed on MVPDs that may have a higher percentage of customers that are lower income?

        iv. Penetration requirements imposed on MVPDs that may have a higher percentage of customers in which English is not their primary language?

    e. Canada is in the process of requiring cable operators to offer both "skinny bundles" and *a la carte* choices.[30] Such requirements would effectively preclude penetration requirements. What impact have these requirements had, and will likely have, for MVPD customers in Canada? Is this a good model for the Commission to follow?

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[29] *Id.* at 27 (noting that, under some penetration requirements, if too many subscribers choose the broadcast basic tier, a small cable operator must move the channel in question into that tier to meet penetration requirements—or pay as if it had done so").

[30] http://www.crtc.gc.ca/eng/archive/2015/2015-96.htm

3. MFNs

Press reports indicate that the Commission may seek comment on limits on the use of MFNs similar to those imposed by the Department of Justice on Charter Communications in its merger with Time Warner Cable.[31] That decree prohibits Charter from entering into "unconditional MFNs" or "cherrypicking MFNs" *employed against online video distributors*.[32]

ACA and others, however, have submitted record evidence, including declarations issued under penalty of perjury, suggesting that large MVPDs also enter into such MFN clauses *aimed at other MVPDs*. Such arrangements harm diversity by preventing independent programmers from entering into flexible agreements with smaller MVPDs.[33]

In light of this record evidence, a diversity-related NPRM should seek comment on the following issues:

1. Do the concerns expressed in the Charter consent decree also apply to unconditional and cherrypicking MFNs employed against smaller MVPDs?

2. What harm do such clauses cause independent programmers? ACA and independent programmers both claim that such carriage hinder MVPD carriage of independent programmers.[34] while larger MVPDs claim otherwise.[35] How can we reconcile these competing claims?

3. Should the Commission restrict or prohibit "forced" MFN provisions? If so, how can the Commission determine when such requirements are "forced" or are the product of a negotiated give-and-take?

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[31] John Eggerton, *Sources: Indie Programming NPRM Based on Charter-TWC Conditions*, MULTICHANNEL NEWS (Aug. 4, 2016), *available at* http://www.multichannel.com/news/fcc/sources-indy-programming-nprm-based-chartertwc-conditions/406877.

[32] *United States v. Charter Commc'ns, Inc.*, Competitive Impact Statement at 17, Civil Action No. 1:16-cv-00759 (RCL) (May 10, 2016), *available at* https://www.justice.gov/atr/file/850161/download ("For these reasons, Section IV.B.2 of the proposed Final Judgment prohibits New Charter from entering into or enforcing unconditional MFNs against programmers for distributing their content to OVDs").

[33] ACA Comments at 33.

[34] *Id;* Comments of TheBlaze, MB Docket No. 16-41, at 5 (filed Mar. 20, 2016); Comments of KSE MB Docket No. 16-41, at 5 (filed Mar. 20, 2016); Comments of Ride TV, MB Docket No. 16-41, at 5 (filed Mar. 20, 2016); Comments of HITN MB Docket No. 16-41, at 4-5 (filed Mar. 20, 2016).

[35] Comments of AT&T, MB Docket No. 16-41, at 12 (filed Mar. 20, 2016); Comcast/NBCU Comments at 25-26.

4. Should the Commission prohibit or restrict unconditional or cherrypicking MFNs altogether?

5. Should the Commission prohibit or restrict such MFNs if employed against smaller MVPDs or their buying groups that lack negotiating leverage?

6. If the FCC restricts such MFNs, should it do so for existing contracts as well as future contracts? Does it have authority to do so?

4. Definition of "Independent Programmer"

The *Diversity NOI* defines an "independent video programmer" or "independent programmer" for purposes of this proceeding as "one that is not vertically integrated with an MVPD."[36] Numerous commenters, including ACA, pointed out that this definition fails to capture large programming conglomerates such as Disney and Fox.[37] A diversity-related NPRM should seek comment on a more appropriate definition of "independent programmer." One possibility might be that suggested by ITTA, which describes independent programmers as those not "vertically integrated with broadcast networks and/or movie studios," as well as those unaffiliated with MVPDs.[38] Another possibility might be whether the programming in question is considered "must-have." The Commission has identified network broadcast and live sports programming as being especially important.[39] Should the Commission consider any programmer affiliated with a national network or that carries significant live sports programming not to be "independent"? Given the regulatory advantages conferred upon them, can *any* broadcaster appropriately be considered "independent" for diversity-purposes?[40] Likewise, ACA has identified nine programmers—Disney/ESPN, Fox, Comcast/NBCU, Turner, Viacom, AETN, AMC, Discovery, and Scripps—that it alleges to engage in forced bundling.[41] Is this an appropriate list of entities that should not be considered "independent"? Would any of the proposed definitions of "independent programmers" exclude these providers?

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36 *Diversity NOI*, ¶ 1 n.4.

37 ACA Comments at 3 n.4; ACA Reply Comments at i; *id.* at 5 n.13 (summarizing comments on definition of "independent programming").

38 Comments of ITTA, MB Docket No. 16-41, at 3 (filed Mar. 20, 2016).

39 *Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶ 36 (2011) (describing Comcast and NBCU's suite of "marquee" programming as including "a broad portfolio of national cable programming in addition to RSN and local broadcast programming").

40 *See* Comments of the American Television Alliance, MB Docket No. 15-216, at 4-5 (filed Dec. 1, 2015) (describing myriad regulatory advantages accruing to broadcasters).

41 ACA Comments at 14.

5. Legal Authority

A diversity-related NPRM should also seek comment on the Commission's authority to address these issues. This should, of course, include sources identified in the *Diversity NOI* itself.[42]

1. *Policies Favoring Diversity.* Section 257(b) of the Communications Act states that "the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity."[43]

2. *Program Carriage.* Section 616(a) of the Communications Act, which requires the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors." ACA has noted in the past that this provision applies only to vertically integrated MVPDs.[44]

The Commission should also seek comment on potential authority to act contained in sources not identified in the *Diversity NOI.* These include:

1. *Program Access.* Section 628(b) of the Communications Act makes it "unlawful for a cable operator [or] a satellite cable programming vendor in which a cable operator has an attributable interest . . . .to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[45] The Commission should seek comment on whether this provision grants authority to address acts harmful to diversity interests engaged in by vertically integrated programmers.

2. *Retransmission Consent*. Section 325(c)(3) of the Communications Act requires the Commission to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection" and to "consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier." The Commission should seek comment on whether this provision grants authority to address acts harmful to diversity interests engaged in by broadcasters. It should also seek comment on how best to exercise this

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[42] *See* ACA Reply Comments at 26 n.99 (discussing the Commission's authority under the statutory provisions identified in the *Diversity NOI*).

[43] 47 U.S.C. § 257(b).

[44] Comments of the American Cable Association, MB Docket No. 11-131, at 2 (filed Nov. 28, 2011).

[45] 47 U.S.C. § 548(b).

authority—whether in the context of an individual complaint under the "totality of the circumstances" test for good-faith negotiation or through a change in the rules. It should also seek further comment on proposals submitted by ACA and the American Television Alliance in the good-faith negotiation proceeding.[46]

3. *Section 706*. Section 706 of the Telecommunications Act directs the Commission to "take immediate action" in the event that advanced telecommunications capability is not being deployed in a reasonable and timely fashion. To encourage the deployment of advanced telecommunications, the Commission is authorized to employ "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." The DC Circuit has held that this represents an independent grant of regulatory authority.[47] The Commission should seek comment on whether this provision grants authority to address acts by programmers that preclude some or all MVPDs from investing in broadband deployment, such as by compelling them to divert potential broadband capacity or capital intended for broadband to the provision of video service.

* * *

Again, ACA would like to thank the Commission for its efforts to promote video diversity. It pledges to work constructively with the Commission as it moves forward on this important issue. Pursuant to the Commission's rules, I will file one copy of this letter electronically in MB Docket No. 16-41. Should you have any questions, please contact me.

Respectfully submitted,

Michael Nilsson

cc: Meeting attendees

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[46] ACA STELAR Comments at 33-34; *id* at 44-47.

[47] *Verizon v. F.C.C.*, 740 F.3d 623, 637 (D.C. Cir. 2014).